SUPREME COURT, U. S
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RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-55

RALPH WILLIAMS FORD, a California corporation,

Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MOTOR VEHICLES and CALIFORNIA NEW CAR DEALERS POLICY AND APPEALS BOARD,

Respondents.

Petitioner's Reply to Response to Petition for Writ of Certiorari.

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SUBJECT INDEX

Page

Petitioner's Reply to Response to Petition for Writ of Certiorari 1

Correction of Factual Errors 1

Appendix J. Admissions by the Attorney General That the Penalty Imposed Was Based Upon Uncharged and Unproven Allegations of Misconduct .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Board of Trustees v. Metzger (1972) 8 Cal.3d 206, 104 Cal.Rptr. 452, 502 P.2d 1172	4
Coberly Ford v. D.M.V., Appeal No. A-25-72	3

Statutes	
California Evidence Code, Sec. 452	3
California Vehicle Code, Sec. 4456	2, 3
California Vehicle Code, Sec. 11713(g)	2, 3

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Correction of Factual Errors.

Petitioner wishes to correct certain errors appearing in Respondent's Response to Petition for Writ of Certiorari. These errors illustrate and highlight the basic violations of due process and denial of a fair hearing which have occurred in this case:

1. At pages 8-9, Respondent correctly acknowledges that Petitioner never disputed the nine allegations of overcharging customers for registration fees. These nine violations, totalling $103.00, were admitted and were never in dispute.[1] However, at page 9, Respondents go

[1]In the opinion of the California Court of Appeal it is stated: "Williams produced evidence of its accounting procedures in an attempt to show it had not made the overcharges set forth in the accusation." (See Appendix A-5.) *This is incorrect.*

on to state that evidence concerning refunding of overcharges and accounting records pertaining thereto were introduced *by Petitioner by way of mitigation.* This is incorrect, and this error goes to the core of the case for the reasons that matters concerning the refunding of and accounting for overcharges (a) were not within the scope of the Accusation and (b) admittedly furnished the basis for the severe penalty imposed.

In truth, the extraneous issue of refunding overcharges was first introduced by Respondent Department of Motor Vehicles in its case in chief, and the Hearing Officer thereafter demanded that Petitioner introduce further evidence on this topic. Petitioner was *forced* to produce evidence on its accounting procedures, over its objection, at the insistence of the Hearing Officer, who stated on the record his mistaken belief that allegations of failure to refund overcharges were contained in the Accusation.[2]

Thus, the issues of refunding overcharges and accounting for them were not invited by Petitioner; they were thrust upon Petitioner by Respondents and over Petitioner's objection.

2. At page 8, Respondents argue that disciplinary action was taken against Petitioner only for the three violations of §4456 and the nine violations of §11713 (g). Respondents then acknowledge, however, that matters outside the scope of the Accusation were considered in determining the nature of the penalty.

In order to place this issue in proper perspective, it should be observed that the three violations of §4456

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[2]See Petitioner's Statement of the Case, paragraph 2—Administrative Hearing—at pages 4-5 of the Petition for Writ of Certiorari.

and the nine violations of §11713(g) (which totalled $103.00) were de minimus, and that the severe penalty here imposed was based solely upon the "possible" and "potential" violations which were neither charged, proved, nor found to be true. This was repeatedly and unequivocally admitted by the Attorney General in the state court proceedings,[3] and analysis of other decisions by Respondent Appeals Board support this admission.[4]

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[3]a. From Respondent Board's Memorandum of Points and Authorities in the California Superior Court:

> "The basis for the decision was the failure of petitioner to account for the substantial sums of fiduciary money which petitioner claimed that it was refunding." [C.T. p. 398, lines 27-30]; ". . . *since it is overwhelmingly clear that the penalty in this case is a result of the failure to account for overcharges,* in the event this Court wishes to find that the violations of section 4456 do not warrant a penalty, there is no need to remand the case for further consideration of penalty." [C.T. p. 416, line 29 to p. 417, line 2; emphasis added.]

b. From oral argument in the California Superior Court, May 5, 1971 hearing:

> ". . . appellant's failure to properly account for these overcharges was so severe that the penalty imposed was not an abuse of discretion." [p. 10, lines 11-15.]
>
> ". . . *they* [*the Board*] *determined the penalty based on the fact that the procedures for accounting those overcharges, including all others, was not done.* They [Petitioner] had no accounting procedures." [p. 29, lines 16-19; see also: p. 29, line 14 to p. 30, line 3; p. 37, line 28 to p. 39, line 14; emphasis added.]
>
> From February 3, 1971 hearing, see R.T. p. 26, lines 17-22; p. 30, lines 7-9; p. 32, lines 21-22; p. 33, lines 13-20.

[4]In the proceedings below, copies of other decisions by Respondent New Car Dealers Policy and Appeals Board were placed in the record for judicial notice pursuant to California Evidence Code §452. For example, in *Coberly Ford v. D.M.V.*, Appeal No. A-25-72, the licensee was found guilty of *3627* violations of §4456, *14* violations of §11713(g), and numerous other violations of a more serious nature, but the penalty imposed (20 days suspension, suspension stayed) was far lighter than that imposed here and involved *no interruption* of the licensee's business.

3. At page 9, Respondents state that Petitioner's evidence showed that the account to which it credited refunds from the Department "had a credit balance of $16,570.03, . . ." [thereby raising an inference that Petitioner had failed to refund overcharges in this amount]. This is not only outside the scope of the Accusation, it is factually incorrect.[5]

a. In fact, according to uncontroverted evidence, the account in question (Account No. 83) for the period in question showed a net *debit* or *loss* of $12,380.22, not a *credit* balance (A.T. p. 934, line 17 to p. 935, line 20, p. 937, lines 4-14).[6]

b. Still worse, Petitioner is to be punished not because the evidence shows that Petitioner *failed* to pay refunds of $16,570.03 [rather than $103.00 as charged and proven], but because Petitioner did not prove to Respondents' satisfaction that it *had* paid refunds concerning this $16,570.03 item. Respondent Board's decision so reflects [C.T. p. 55] and the Attorney General repeatedly admitted in the state court proceedings that there was neither proof nor finding that Petitioner was guilty of failing to refund overcharges. Rather, he acknowledged that the penalty was imposed because Petitioner had failed to meet its "burden of proving" that it was innocent of this uncharged accusation.[7]

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[5]The trial court, whose factual findings are conclusive on appeal [*Board of Trustees v. Metzger* (1972) 8 Cal.3d 206, 211, 104 Cal.Rptr. 452, 502 P.2d 1172], found that this matter was outside the scope of the Accusation and therefore did not rule on the underlying factual error [C.T. p. 494, line 31 to p. 495, line 7].

[6]Moreover, Account No. 83 did not and was not intended to show whether refunds had been paid (A.T. p. 937, line 26 to p. 938, line 5; p. 944, lines 5-28). The only evidence on this point was that all refunds had in fact been paid (A.T. p. 536, line 12 to p. 538, line 2; p. 961, line 24 to p. 963, line 1).

[7]A summary of statements made by the Attorney General in state court proceedings is attached hereto as Appendix J.

c. Concluding on this point, we further note that, at the later hearing before Respondent Appeals Board, Petitioner offered documentary proof that all refunds had been paid, but this offer was rejected by the Board on the ground it should have been presented at the initial proceeding before the Hearing Officer [Transcript of Appeals Board Hearing, p. 71, line 4 to p. 72, line 20]. Thus, at the original administrative hearing, where Petitioner had no prior notice that the questions of accounting procedures and repayment of over $16,000.00 in overcharges would be in issue, Respondents found the evidence that Petitioner had repaid all overcharges to be unpersuasive. When Petitioner subsequently sought to introduce documentary proof at the Appeals Board level, it was rejected as coming too late. Thus, even under Respondents' erroneous ground rules, *i.e.*, that Petitioner had the burden of proving it was *not* guilty of this uncharged offense, Petitioner never had a fair chance to *disprove* this "potential" or "possible" offense.

In summary, the foregoing factual errors in Respondents' Response to Petition for Writ of Certiorari highlight the issues presented for consideration by this Court: The few minor offenses with which Petitioner was charged and found guilty were de minimus. The "possible" or "potential" offenses for which Respondents intend to punish Petitioner were neither *charged, proved, nor found to be true.* Nevertheless, Petitioner now faces severe punishment because Petitioner has failed to meet "the burden of proving" that it is innocent of allegations of misconduct with which it was never charged and of which it was never found guilty.

Surely, the procedures followed in this case fall below the minimum requirements of due process and should not be condoned or tolerated.

Respectfully submitted,

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APPENDIX J.

Admissions by the Attorney General That the Penalty Imposed Was Based Upon Uncharged and Unproven Allegations of Misconduct.

The Attorney General through Deputy Attorney General Leicester, repeatedly admitted that there was no proof that Petitioner was guilty of failing to refund overcharges. Rather, he acknowledged that the penalty was imposed because Petitioner had failed to meet its "burden of proving" that it was innocent of this uncharged accusation:

> "Now I would like to also emphasize just one point. *There was no finding that refunds were not made. All that the findings said was that they had not shown they are making refunds,* and that is very significant because they are the ones who are claiming mitigation after showing aggravating circumstances on their own. *So, we haven't proven or alleged or found that they were failing to make refunds, essentially, supposedly a different violation.* That is not the case." [Emphasis added; February 3, 1971 hearing, R.T. p. 28, lines 11-19.]
>
> "At least that's the way I view the record in this case, and I also view the case in the light that *the Department felt it was the duty of the respondent here to prove that in every event they had made such refunds,* and having failed to do so, in view of the fact that they felt that there was at least $16,000 of unaccounted-for funds that belonged to the purchasers of these automobiles, he was entitled to a very stiff penalty.
>
> "Now, that's exactly the way I viewed the record in this case.

"MR. LEICESTER: Well, I would substantially agree with what your Honor said, with one exception: *I don't think the Department found that the dealer did in fact not refund the money. I think what the Department found was that there was no way you could tell.*

"THE COURT: That's right.

"MR. LEICESTER: And I think that's significant, though, because if they had gone out and said, 'Lookee here, it's perfectly clear beyond a doubt they didn't refund this money; they walked away with $16,000,' they're committing grand theft.

"Now, it may very well be that the dealer has in fact refunded a substantial amount of this money. It may very well be, and, of course, that's what the dealer was contending. But, you know, business regulation requires some evidence. You can't just take the licensee's word for it. If we did, we wouldn't have any business registration." [Emphasis added; May 5, 1971 hearing, R.T. p. 37, line 28 to p. 38, line 24.]

"MR. LEICESTER: So its your viewpoint, in other words, that the Board felt that Ralph Williams had—

"THE COURT: Had the burden of going forward to proving them, and they didn't meet that burden.

"MR. LEICESTER: We will agree with that, too. *He does have the burden of proving it.* But there is a difference between—

"MR. HORVITZ: We do have the burden of proving it?

"MR. LEICESTER: I think that is a matter of evidence. The burden shifted. You raised such a doubt that at this point the conclusion is that—Well, let's put it this way: Assuming this can be taken into consideration in determiniing penalty now, having overcharged the monies, I think it's incumbent upon the person who has the money to show what he did with it.

"MR. HORVITZ: You mean it is incumbent on us to disprove a serious accusation with which we were never charged?

"MR. LEICESTER: Well, you can describe it any way you want." [May 5, 1971 hearing, R.T. p. 43, line 27 to p. 44, line 16; see generally, p. 43, line 19 to p. 45, line 3; emphasis added.]

3. Finally, the Attorney General candidly admitted that the proceeding was characterized by a lack of concern for the requirements of due process:

"And this may be improper to consider in the case of due process of trial, but I think the Board had in mind it was the responsibility of the dealer to show what it did with the money." [May 5, 1971 hearing, R.T. p. 44, lines 22-25; see also February 3, 1971 hearing, R.T. p. 30, lines 14-17; emphasis added.]